In The
Supreme Court Of The United States
October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF PUBLIC CITIZEN

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, a non-profit public interest organization whose membership includes over 100,000 consumers. This case arises under the Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1982), which was designed by Congress specifically to protect consumer welfare. *See NCAA v. Board of Regents*,

468 U.S. 85, 107 (1984). Part of Public Citizen's mission is to ensure that the nation's antitrust laws are enforced for the benefit of consumers. In addition, Public Citizen is interested in this case because, as the lessee of three photocopiers manufactured by petitioner Eastman Kodak Company ("Kodak"), it is directly and adversely affected by Kodak's anti-competitive practices.

This case involves a successful attempt by Kodak, a manufacturer, marketer, and servicer of photocopiers and micrographic equipment, as well as a supplier of the parts for such equipment, to corner the market for Kodak replacement parts and to leverage that situation into a stranglehold on the market for service of Kodak equipment, thereby destroying the businesses of a number of independent service organizations that compete with Kodak in this market. Public Citizen, as a representative of consumers generally, is interested in this case because the ultimate price of Kodak's activities has been, and will continue to be, paid by consumers, especially existing owners of Kodak equipment, who have been forced to obtain parts and service from Kodak at inflated prices. Moreover, consumers of other equipment will be injured if other manufacturers are permitted to mimic Kodak's strategy and extract monopoly rents in the after-markets for their products.

A central issue in this case is Kodak's ability to control the service market by virtue of its power over the market for Kodak replacement parts. This issue in turn hinges on a factual question concerning consumer behavior in the marketplace for photocopiers and micrographics equipment. Due to Public Citizen's expertise on consumer behavior and its position as a consumer of Kodak equipment, it is able to offer a different perspective than that of the respondents.

STATEMENT

This case involves a concerted attempt by Kodak to limit the supply of Kodak replacement parts and, in so doing, to gain control over the market for servicing Kodak equipment. Since there has been no trial in this case, and only limited discovery, all factual doubts must be resolved against Kodak, the party that moved for summary judgment. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Accordingly, this statement sets forth the facts as respondents allege they can be established at trial.

Kodak's illegal activities started in mid-1985, when it embarked on a campaign to take control of the market for Kodak parts and drive independent service organizations ("ISOs") out of the service business for Kodak equipment. Prior to that time, Kodak had an open sales policy for Kodak parts, and did not attempt to prevent ISOs from competing with it in the service market for Kodak equipment. Joint Appendix ("JA") 99; JA 152; JA 349-50; JA 415-16; JA 435.

Kodak utilized a two-step strategy to control the markets for Kodak parts and service. The first step was to cut off ISOs from potential supplies of Kodak parts by effectively making Kodak the sole source of supply for replacement parts. This was accomplished by: (1) agreeing with independent original equipment manufacturers ("OEMs"), which supply Kodak with 90% of parts for Kodak equipment, that the OEMs would not sell any parts that fit Kodak equipment to anyone other than Kodak (JA 428-29; JA 468; JA 496); (2) pressuring Kodak equipment owners not to sell Kodak parts to ISOs (JA 428-29); (3) pressuring independent parts distributors not to sell Kodak parts to ISOs (JA 517-18; Documents lodged with Clerk with the filing of the Joint Appendix ("L") 140; L 143); and (4) effectively closing the used machine market, including as a parts source. JA 423; JA 427-28; JA 510-11; JA 650.

The second step in Kodak's scheme was to utilize its

newly achieved control over Kodak replacement parts to drive ISOs out of the service business. This was accomplished in part by conditioning the sale of parts to its customers on their agreement to refuse to deal with ISOs, thereby effectively "tying" Kodak service to Kodak parts, on which Kodak now held a virtual monopoly. JA 428-29; L 163. Kodak also required ISOs who wanted to buy Kodak parts from Kodak to stop servicing any Kodak equipment other than their own and to stop selling used Kodak machines. L 143; L 159.

By 1987, Kodak had largely succeeded in controlling the supply of Kodak parts and driving many ISOs out of the service business. JA 422; JA 463. Remaining ISOs have suffered the loss of substantial revenues and accounts (JA 458-59; JA 495-96; JA 501-02), and consumers of Kodak equipment have also suffered by being forced to pay higher prices for inferior service. JA 420-22; JA 425-27; JA 474-75; JA 514.

A complaint was filed on April 14, 1987, on behalf of 18 small ISOs that, among other things, repaired, serviced, and sold parts for Kodak equipment ("respondents"). JA 411; JA 449; JA 462; JA 470-71; JA 504. The complaint alleged, *inter alia*, that Kodak violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1982), by monopolizing the Kodak parts market, conspiring with others to deny Kodak parts to respondents, monopolizing an aftermarket for Kodak service and reconditioned equipment, and restraining trade through agreements tying the sale of Kodak service to Kodak parts. JA 5-37.

Kodak moved for summary judgment before respondents had even initiated discovery, arguing that the "material facts with respect to the challenged business practices . . . are not seriously disputed." JA 91. Over respondents' objections, the district court permitted only very limited discovery (JA 255-98; JA 315-25), and then, on April 18, 1988, granted Kodak's motion, and dismissed the action.

On appeal, respondents argued that they had raised a

number of triable issues including: (1) whether Kodak's refusal to sell parts to equipment owners, unless they agree not to use ISOs, constitutes a tying arrangement violative of Section 1 of the Sherman Act;[1] and (2) whether Kodak's refusal to sell parts to ISOs, in combination with its other efforts to control the market for Kodak parts and service, is an act of monopolization violative of Section 2 of the Sherman Act. *See Image Technical Serv., Inc. v. Eastman Kodak*, 903 F.2d 612, 614 (9th Cir. 1990).

On May 1, 1990, a divided panel reversed the order of dismissal, finding that triable issues of fact existed with respect to both the Section 1 tying claim and the Section 2 monopolization claim. With respect to the tying claim, the Court rejected Kodak's theory that, since it allegedly does not have market power in the interbrand markets for copier or micrographic equipment, it cannot as a matter of law have sufficient economic power in the parts market to result in an illegal tying arrangement.[2] The Court stated that, whether it is possible for a firm in a competitive basic equipment market to charge supra-competitive prices for equipment parts, is not a question that should be decided "on a theoretical basis." *Id.* at 617. The Court further noted the absence of a fully developed record on the market power issue due to the "very limited discovery" that was permitted by the district court. *Id.* Despite the absence of full discovery, however, the Court stated that respondents *had* presented evidence that Kodak

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[1] Respondents specifically argued that whether the tying arrangement is a *per se* violation of the Sherman Act, or merely an unreasonable restraint of competition under the rule of reason, its legality requires a factual development. JA 746-47.

[2] In order to establish a *per se* illegal tying arrangement, it is necessary to demonstrate sufficient economic power with respect to the tying product (parts) to restrain competition appreciably in the tied product (service). *See Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 499 (1969).

may in fact have used its power in the parts market to leverage an unfair advantage in the service market. *Id.* Such evidence, ruled the Court, is sufficient to raise a material issue of fact as to whether Kodak has sufficient power in the parts market to sustain a tying claim. *Id.* at 618. With respect to the monopolization claim, the Court rejected Kodak's argument that it could not have monopoly power in the service market since it allegedly lacks market power in the interbrand market. *Id.* at 621. As with the tying claim, the Court held that Kodak's theory simply did not "mirror[ ] reality." *Id.*

The dissent disagreed on both counts. As to the tying claim, the dissent wrote that Kodak's "lack of power in the interbrand market *necessarily* precludes power in the derivative market ...." *Id.* at 622 (emphasis in original). The dissent rejected respondents' evidence that Kodak, in fact, does exert power in the aftermarkets for Kodak parts, stating that "[n]o amount of evidence of pricing in the derivative market" can overcome the presumption raised by Kodak's alleged lack of power in the interbrand market. *Id.* Thus, the dissent concluded that respondents had failed to raise any genuine issues of material fact with regard to Kodak's market power in the market for replacement parts. *Id.* at 623. As to the monopolization claim, the dissent wrote that summary judgment was proper because Kodak had demonstrated a legitimate business reason for its behavior. *Id.* at 621.[3]

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[3] In so ruling, the dissent ignored a fundamental tension in Kodak's defense. On the one hand, Kodak claimed that its alleged lack of market power in the interbrand equipment market proved that it could not, as a matter of law, have attempted to monopolize the markets for Kodak parts or service. Under this theory, which Kodak embraces exclusively in this Court, whether Kodak had a legitimate justification for its acts is legally irrelevant. At the same time, however, Kodak strained to excuse

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SUMMARY OF ARGUMENT

Both of respondents' Sherman Act claims hinge on a factual question concerning the extent of Kodak's economic power in the aftermarkets for parts and service. Kodak attempts to transform this fact question into a legal one by arguing that an equipment manufacturer lacking interbrand market power cannot, as a matter of law, wield sufficient power in aftermarkets for parts or service to create either tying or monopolization liability. In this way, Kodak urges the Court to adopt a rule of *per se* competitiveness in aftermarkets for parts and service whenever an absence of market power in the product market is demonstrated.

Kodak's approach should be rejected because it ignores numerous fact questions concerning consumer behavior that bear directly on the market power issue. The central assumption underlying Kodak's theory is that any significant price increases in aftermarkets will inevitably reduce demand for Kodak equipment because the rational consumer necessarily considers the costs of parts and service when choosing among competing equipment sellers. This characterization by an interested manufacturer of the rational consumer, however, fails to recognize that some consumers might not have access to sufficient information about parts and service at the time of equipment purchase, might not be able to use the information they have, or might make purchasing decisions solely based on equipment cost, performance, availability, and the

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its attempt to monopolize the parts and service markets by offering purported justifications for its actions. Since the existence of any justification necessarily involves the factual question of pretext, it would be improper to decide that issue on summary judgment, especially given the limited discovery allowed here.

like, deferring decisions concerning parts and service until the need arises. Moreover, even assuming that price increases in aftermarkets would, as Kodak suggests, reduce demand for Kodak equipment, Kodak might, under some circumstances, still be able to exploit existing, "locked-in" owners of Kodak equipment who have no option other than to purchase Kodak equipment and service at inflated prices. Thus, Kodak might be able to sustain long-term, anti-competitive strategies in parts and service aftermarkets notwithstanding an absence of market power in the interbrand equipment market.

The extent of Kodak's power in the markets for replacement parts and service, then, hinges on a number of fact questions about consumer behavior that cannot be resolved without further development of the record. Kodak's suggestion that this Court should apply a *per se* rule of competitiveness whenever an absence of interbrand market power is demonstrated assumes these critical fact questions out of existence. As this Court has recognized, it is improper to use *per se* rules to create antitrust liability in complex cases such as this one; it is equally improper to preclude antitrust liability when the record presents serious questions about how the market really works.

Given the presence of a genuine factual dispute with respect to the market power issue, the Court of Appeals properly reversed the district court's decision granting summary judgment in Kodak's favor. The only "proof" offered by Kodak on the market power issue concerned its alleged lack of power in the interbrand equipment market. This proof falls far short of the mark, since even if Kodak does lack power in the equipment market (an issue that is itself the subject of dispute), this does not by any means dictate a finding that Kodak lacks power in the parts and service aftermarkets. Thus, Kodak did not even meet its initial burden of demonstrating an absence of disputed facts with respect to the market power issue. Moreover, even if Kodak had met its initial burden under the summary judgment standard, respondents have offered more than sufficient evidence of Kodak's actual power in the parts and service aftermarkets to withstand a motion for summary judgment.

ARGUMENT

THE DECISION REVERSING THE GRANT OF SUMMARY JUDGMENT MUST BE AFFIRMED BECAUSE THE MARKET POWER ISSUE IS A FACT QUESTION THAT CANNOT BE RESOLVED BY APPLICATION OF A *PER SE* RULE OF COMPETITIVENESS.

To establish tying liability under Section 1, it is necessary to demonstrate that "the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984) (citations omitted). To establish monopolization liability under Section 2, it is necessary to demonstrate the "power to control prices or exclude competition" in the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956). Thus, determining the extent of Kodak's market power is central to both of respondents' claims.

Kodak's primary argument in this Court is that an equipment manufacturer lacking interbrand market power cannot, as a matter of law, wield sufficient power in aftermarkets for parts or service to create either tying or monopolization liability. *See* Petitioner's Brief on the Merits ("PB") at 16-27. Absent interbrand market power, theorizes Kodak, any attempt to raise prices to noncompetitive levels in aftermarkets for parts or service would simply serve to drive off customers, both old and new. In the long-run, the argument goes, the price of survival in the interbrand market would be the

restoration of competitive prices in aftermarkets. Thus, absence of interbrand market power in equipment markets is said automatically to preclude long-term, supra-competitive pricing and other anti-competitive tactics in aftermarkets for parts and service.

This theory reflects a tidy vision of consumer practices that is not born out by the facts or the law. In effect, Kodak is urging this Court to ignore the factual complexities of consumer behavior and instead apply a rule of *per se* competitiveness in aftermarkets whenever an absence of market power in the product market is demonstrated. However, as this Court has recognized, *per se* rules are a crude and inexact way to dispense with antitrust cases that raise questions about how markets really work. *See, e.g., Federal Trade Comm. v. Indiana Fed. of Dentists*, 476 U.S. 447, 458-59 (1986) (noting the Court's "reluctance to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); *see also NCAA v. Board of Regents*, 468 U.S. 85, 100-01 (1984). Although Kodak's theory may be an accurate predictor of consumer behavior under some circumstances, the market power issue is fundamentally a fact question that should only be resolved after a full and fair opportunity for discovery and, perhaps, trial.

A. KODAK'S ATTEMPT TO RESOLVE THE MARKET POWER ISSUE BY APPLICATION OF A *PER SE* RULE OF COMPETITIVENESS IGNORES THE COMPLEXITY OF CONSUMER DECISION-MAKING.

1. Kodak Incorrectly Assumes That All Consumers Consider The Costs Of Parts And Service When Selecting Equipment.

Kodak's theory, as outlined above, is based on a number of over-simplified assumptions about consumer behavior. The first concerns the effect of price increases in parts and service markets on potential new purchasers of Kodak equipment. Kodak argues that any significant price increases in aftermarkets will inevitably reduce demand for Kodak equipment because the rational consumer necessarily considers the cost of parts and service when choosing among competing equipment sellers. Put another way, Kodak treats the product purchased by all new consumers as not just the equipment, but a single unbundled unit of present equipment and future parts and service needs.

This approach is wrong, not because it may not accord with reality in some cases, but rather because it assumes a serious factual question out of existence. Notwithstanding Kodak's claims to the contrary, the reality may well be that many consumers do not base their purchasing decisions on the combined cost of equipment, parts, and service.[4]

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[4] For the reasons stated by respondents, the Court of Appeals incorrectly found that respondents do not dispute that equipment purchasers consider the cost of parts and services when deciding on equipment. *See* Respondents' Brief on the Merits ("RB") at Statement of the Case (E). Even if respondents had conceded this

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For example, some customers might not have access to information about the availability and price of parts and service at the time of equipment purchase. Contrary to Kodak's claims, this would make perfect "economic sense" (PB at 29) given the obvious disincentives for equipment sellers (such as Kodak) to make full disclosure of their past repair histories and costs, and the absence of anything resembling a Consumers' Reports on commercial copiers and micrographics equipment and their service costs. Unlike what is available for televisions and dishwashers, independent, dependable projections of the costs of parts and service are not readily available for these products.

Even assuming sufficient access to information about parts and service at the time of equipment purchase, even sophisticated consumers may not be able to make good use of such information due to the difficulty of predicting the type of repairs that might be required, whether the costs will be principally service or parts, and how frequently they should expect major service problems for which there can be substantial differences in the prices of the parts and/or the service.

Still other customers might not even attempt to evaluate the markets for parts and service when making their initial decision to lease or purchase a Kodak machine. For example, a buyer of Kodak equipment that has entered into a maintenance agreement with Kodak for the term of the warranty might not consider the availability of parts or service beyond the initial warranty period. Or a lessee of Kodak equipment, with an option to purchase, might defer consideration of the

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issue, this Court performs its own review of the record and is not constrained by the errors of parties. *See Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 872-73 (1982).

cost of parts and service until the option is ripe -- at which time the sunk costs in the machine might compel a purchase, notwithstanding Kodak's inflated prices for parts and service.

In short, a host of factors suggest that, from the standpoint of the consumer in the market for a photocopier or micrographic equipment, the costs to be considered when making a purchasing decision might not encompass service or parts at the time the equipment purchase decision is made. For such consumers, supra-competitive pricing in aftermarkets for service and parts would not affect the decision whether to purchase equipment from Kodak or from one of its competitors. In this scenario, Kodak could exploit consumers of Kodak parts and service notwithstanding an absence of market power in the equipment market.

Thus, Kodak oversimplifies consumer behavior by assuming that all consumers in the market for Kodak equipment evaluate parts and service costs at the time of equipment purchase. In fact, the actual behavior of consumers under the circumstances presented in this case is a factual question that cannot be resolved on the record before this Court.

2. Kodak's Attempt To Deny The Existence Of "Lock In" Also Assumes Too Much.

The second suspect assumption in Kodak's theory of consumer behavior concerns existing owners of Kodak equipment. As the Court of Appeals noted, the record shows that some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems. 903 F.2d at 617. For these "locked-in" owners, then, Kodak is able to charge monopoly prices for parts and service notwithstanding its alleged lack of power in the interbrand equipment market.

Kodak's argument against the existence of lock-in has a familiar but hollow ring to it. According to Kodak, absent

market power in the market for interbrand equipment, no company could successfully exploit locked-in customers by charging monopoly prices for service and parts. To do so, says Kodak, merely would drive away new and repeat purchasers. *See* PB at 25-26. Kodak goes on to suggest that a lock-in strategy is "impossible" in this case, since Kodak would never make more total profit by overcharging its existing customers than it would lose as equipment sales dry up. *Id.*

This argument again assumes too much. First, as discussed above, it is not at all clear that the cost of service and parts plays a significant role in decisions to purchase new equipment, even among customers that already have Kodak equipment. This is a factual question that cannot be resolved on the present record.

Second, the argument assumes that Kodak must offer service to new and repeat customers on the same terms it charges to existing, locked-in, customers. But Kodak could insulate new or repeat customers from price increases by a variety of strategies, such as offering special maintenance agreements or service contracts that do not reflect the monopoly prices charged to locked-in customers. In this way, Kodak could exploit existing customers without driving off important new business.

Third, the lock-in effect may vary depending on the extent of a consumer's investment in Kodak equipment. For example, the lock-in effect is likely to differ for those who own one copier, that readily can be replaced, and those, like the clients that respondents and other ISOs serve, who own a large number of copiers and for whom switching to a new brand might not be a feasible option. The lock-in effect for bulk consumers undoubtedly is made worse by the fact that any attempt to break the lock by replacing worn-out Kodak copiers with competitors' machines as the need arises would likely result in non-uniformity of brands within a single company, especially for those owners who, like many customers of respondents, own many machines rather than one or two.

Such customers might be locked-in to paying higher prices for service to Kodak because the burden and expense of operating and maintaining different equipment brands prevents them from taking advantage of interbrand competition. Thus, it is quite possible that Kodak could charge monopoly rents to locked-in customers notwithstanding its alleged lack of power in the interbrand market.

The market power issue, then, cannot be resolved absent an inquiry into how these consumers really behave and how these markets really work. The validity of Kodak's theory must be tested by examining, for example, the extent to which its customers consider the availability and cost of parts and service when deciding whether to purchase Kodak equipment, the availability of information to consumers in the market for Kodak equipment, the extent of "lock-in," and the like. These are precisely the sort of fact questions that cannot and should not be resolved by application of *per se* rules. *Cf. United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (conducting extensive factual inquiry to determine relevant market for purposes of analyzing a monopolization claim).

B. KODAK FAILED TO MEET ITS BURDEN OF ESTABLISHING NO GENUINE ISSUE AS TO THE MARKET POWER QUESTION.

The Ninth Circuit properly found that Kodak failed to establish the absence of any genuine issue of fact as to whether Kodak wields sufficient power in the market for Kodak parts to sustain tying and monopolization liability. Kodak claims, erroneously, that it met its burden of proof on this issue by demonstrating Kodak's lack of power in the interbrand equipment market. *See* PB at 27-32. Having done so, says Kodak, the burden shifted to respondents to rebut Kodak's "proof" that it lacks sufficient power in derivative aftermarkets.

This argument fails on several counts. First, Kodak's claim to lack market power in the interbrand equipment market is in fact a hotly contested issue in this case. *See, e.g.*, RB at Statement of the Case (H) (demonstrating that Kodak has substantial market power in at least three of seven interbrand basic equipment markets). Kodak's attempt to assume away this essential fact question should be rejected.

Second, even assuming that Kodak does lack power in the equipment market, this does not dictate a finding that it lacks economic power in the parts market. *See* discussion *supra* at A. Thus, Kodak did not even meet its initial burden of demonstrating an absence of disputed facts with respect to the market power issue. To do so, at the very least Kodak would have to prove that the new equipment market will work as it suggests, *i.e.*, that consumers in the market for copiers and micrographic equipment obtain relevant information about the cost of parts and service and use it during the negotiation for the price of the equipment. Kodak would also have to establish it cannot successfully exploit locked-in customers, *i.e.*, that existing Kodak equipment owners would, if faced with inflated prices in parts and service aftermarkets, switch to other equipment brands.

Since Kodak did not even meet its initial burden on the market power issue, the summary judgment standard enunciated by this Court in *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574 (1986), does not apply in this case. There, the Court held that, when the moving party has carried its burden under Rule 56(c) of the Federal Rules of Civil Procedure, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586 (citations omitted). The Court went on to state that, in an antitrust case, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* at 588.

Contrary to Kodak's claim, this standard does not apply here because Kodak never met its initial burden of establishing the absence of any genuine issue on the market power question. However, even if Kodak had met its burden with respect to the market power issue, respondents have satisfied the *Matsushita* standard. As the Court of Appeals recognized, respondents cast more than a "metaphysical doubt" as to the facts; the record shows, for example, that Kodak charges up to twice as much as respondents for service that is of lower quality than that provided by respondents. 903 F.2d at 617. This evidence would be sufficient to withstand a motion for summary judgment even under the *Matsushita* standard, since evidence of supra-competitive pricing is certainly not as consistent with permissible competition as with illegal monopolization. By Kodak's own theory, no competitor in its right mind lacking interbrand market power would engage in a strategy as self-defeating as charging monopoly prices in derivative aftermarkets, but that appears to be what happened here. In any event, even if Kodak might be able to demonstrate that its supra-competitive pricing is occurring within the context of a competitive marketplace, the existence of such a market is a genuine fact issue that cannot be resolved by summary judgment at this stage of the litigation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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